1999

State of Utah v. Ricky Allen Tueller : Supplement to Opening Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**SUPPLEMENT TO OPENING BRIEF**
v.	:	
RICKY ALLEN TUELLER,	:	**Case No. 99-0820**
Defendant/Appellant.	:	**Priority No. 2**

APPEAL FROM THE THIRD JUDICIAL DISTRICT *COURT IN AND FOR SALT LAKE COUNTY, STATE OF* UTAH, HONORABLE ROGER LIVINGSTON, JUDGE PRESIDING

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(2)

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INTRODUCTION

After Tueller filed his initial opening brief of appellant, the State notified appellate counsel for Tueller that the record of the proceedings was incomplete, in failing to reflect that trial counsel moved for a mistrial after the court, in front of the jury, chastised Tueller for committing perjury and for signaling to his son during his son's testimony.

Appellate counsel has since received a supplemental transcript and files this brief to address trial counsel's motion for a mistrial.

This brief also addresses the preservation of the claim of insufficient evidence, because since the opening brief was filed, the Utah Supreme Court has indicated that counsel must raise insufficient evidence in the trial court. See State v. Holgate, 2000 UT 74, 10 P.3d 346 (generally, parties must raise insufficiency in the trial court).

I.
THE MOTION FOR A MISTRIAL CONFIRMS THE TRIAL COURT'S LACK OF IMPARTIALITY.

The supplemental transcript reflects that after the trial court assailed Tueller for his perjury and for giving signals to his son during his son's testimony, and directed trial counsel to go out and speak with Tueller, trial counsel approached the bench and attempted to move for a mistrial during a bench conference, during which the trial court repeatedly interrupted and implicitly threatened trial counsel (T. 417a-417c). The supplemental transcript states in full at this juncture,

> Mr. Becker: With all due respect to the Court, I think that there's – I'm going to ask for a mistrial. I think that there's –
>
> The Court: Good. Go ahead. And then we'll excuse the jury and I'm going to have to say some things, too, (inaudible) Your client's over there making hand gestures –
>
> Mr. Becker: Okay. But I don't know (inaudible)
>
> The Court: I've had - I've had perjury in my presence –
>
> Mr. Becker: I understand.
>
> The Court: And it's (inaudible) the Court, I've got some grave questions for you, Counsel.
>
> Mr. Becker: Your Honor, I had no idea, I would never have asked those questions (inaudible) I – I appreciate your situation. I — I certainly never suborned perjury in any (inaudible) I have no idea what was actually going to (inaudible)
>
> The Court: I'd like to say to you, Counsel, it's your client –
>
> Mr. Becker: I understand that.
>
> The Court: –that has committed acts of perjury (inaudible) in my presence, committed acts of contempt in my presence and now is engaging in witness intimidation openly and blatantly. I don't have an obligation to stop that?
>
> Mr. Becker: (Inaudible)
>
> The Court: Or do I not –
>
> Mr. Becker: (Inaudible) presence of the jury, so we can do – I mean, I–I–I'm in a situation I've never encountered before. I–I'm at a loss as to what to do.

The Court: Okay.
Mr. Becker: I– I'm not going to answer – I mean, I don't know how to handle (inaudible)
The Court: (Inaudible) the situation; right? Okay.

(Supplemental Transcript at 417a-417c).

Trial counsel was undoubtedly correct in moving for a mistrial, because anytime a trial judge is not impartial, this constitutes structural error requiring a new trial. See Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). The United States Supreme Court has recognized that some errors are not subject to harmless error review, because they do not merely affect the evidentiary balance of a case, but affect the overall framework of a trial, and the trial itself from start to finish. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). Such errors are "necessarily unquantifiable and indeterminate," see Sullivan v. Louisiana, 508 U.S. 275, 282 (1993), and thus do not lend themselves to an evidence-based harmless error analysis.

Structural errors involve "basic protections," in the absence of which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Fulminante, at 307-09.

Examples of "structural errors" include the racially discriminatory use of peremptory challenges, Batson v. Kentucky, 476 U.S. 79 (1986), illegal exclusion of members of defendant's race from the grand jury, Vasquez v. Hillery, 474 U.S.

254 (1986), erroneous instructions on the beyond a reasonable doubt standard of proof, Sullivan v. Louisiana, 508 U.S. 275 (1993), and deprivation of the rights to represent oneself, to counsel, to a public trial, and to an impartial judge, see Fulminante, 499 U.S. 279 at 309-10.

To the extent that trial counsel did not persevere in seeking a mistrial in the face of the trial court's anger and implied threats, it appears that making the motion in the first place was all that was required under Utah law. See, e.g., State v. Nelson, 950 P.2d 940 (Ut. App. 1997)(rejecting State's waiver argument, where trial counsel made proper request for findings and was prepared to challenge eyewitness identification, and stating "We will not require defendant to challenge the trial court's determination again after making its ruling."); and State v. Saunders, 699 P.2d 738 (Utah 1985)((in addressing the merits of a severance issue, the Court indicated that when motions are filed in writing prior to trial, in compliance with Utah Rule of Criminal Procedure 12, there is no need to make exception to the ruling or to renew it at trial).

Tueller maintains that to the extent that the issues were not fully articulated in the trial court, the trial court had a duty to recuse himself, and this Court may address the issue under the plain error and ineffective assistance of counsel doctrines. See Opening Brief of Appellant at 36-38.

II.
THE SUFFICIENCY CLAIM WAS PRESERVED.

Since the filing of the opening brief, the Utah Supreme Court decided State v. Holgate, 2000 UT 74, 10 P.3d 346, which holds that generally, criminal defendants must raise insufficiency of the evidence in the trial court.

In this case, at the close of the State's case, it was unnecessary for trial counsel to formally move for dismissal, because as soon as the jury was excused, the trial court took it upon himself to encourage the prosecution and the defense to consider a lesser included offense instruction (T. T. 290-99), and in so doing, indicated that the prosecutor had presented a sufficient case (T. 291).

Because the trial court had and took the opportunity to rule on the sufficiency of the evidence (T. 291), the issue is preserved. See Holgate, 10 P.3d at ¶ 11 (preservation rule will give trial courts opportunity to rule on issue, will discourage defense counsel from abstaining from raising issue in hopes of planting error). See also, e.g., State v. Larsen, 2000 UT App. 106, at ¶ 9 n.4, 999 P.2d 1252, 1255 (party may raise insufficiency in the absence of a motion in the trial court if trial court ruled on the issue).

Assuming that the issue is not considered preserved, on the facts of this case, the error was a plain one[1] which should have been raised by counsel, and counsel's

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[1] The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial

behavior was objectively deficient and prejudicial in failing to assert this fundamental issue on behalf of Tueller.[2]

Under Holgate, to prevail in raising insufficiency in the absence of preservation under the plain error doctrine, an appellant must demonstrate an obvious and fundamental lack of evidence which should have been plain to the trial court. See id. The lack of evidence to sustain the charge was apparent to the trial court, who immediately began maneuvering the parties toward a lesser included offense instruction as soon as the State's case was completed (T. 290-99), and trial counsel's failure to pursue dismissal was prejudicial because there is a reasonable likelihood that Tueller would not stand convicted of this felony offense had trial counsel asserted his rights.

On the merits, Tueller reasserts the insufficiency argument appearing at pages 40 through 47 of his Opening Brief of Appellant.

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court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

[2] This claim of ineffective assistance of counsel requires Tueller to demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994). The prejudice prong of the ineffective assistance of counsel doctrine requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See e.g. State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

DATED this 12 day of March, 2001.

STEPHEN R. MCCAUGHEY
Counsel for Mr. Tueller

CERTIFICATE OF DELIVERY/MAILING

I hereby certify that I have caused to be served two true and correct copies of the foregoing to Utah Attorney General Mark Shurtleff, 236 State Capitol, Salt Lake City, Utah 84114, this 12 day of March, 2001.

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